

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331
and 71-1332

UNITED STATES OF AMERICA,

v.

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before, Aldrich, Chief Judge,
McEntee and Coffin, Circuit Judges.

On Petition for Rehearing, etc.

January 18, 1972

Robert J. Reinstein and Charles L. Fishman for
appellant..

David R. Nissen, Assistant United States Attorney,
for appellee..

ALDRICH, Chief Judge. Intervenor has filed a petition for "reconsideration." The word is accurately used; intervenor is arguing the same points he made before. His proffered excuse is that the "expedited schedule . . . severely constricted . . . research." If this was so, it is the first we have heard of it. No pre-argument protest of lack of time was raised; no protest was made at the argument; no request was made for permission to file a further brief, either then, or during the eight weeks we had the matter under advisement. Nor should it be forgotten that petitioner sought intervention in August 1971. We would have thought he had ample opportunity to do his research. F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel, Cross Baking Co. v. NLRB, 1 Cir., 12/30/71, F.2d , nor, in the absence of a demonstrable mistake, to permit reargument of the same matters.

We pass this, in view of the importance of the case. More difficult to overlook is the fact that, with our views and reasoning now fully before

him, intervenor, in rearguing the republication issue, fails to address himself to our specific "attempts to reconcile fundamentally antagonistic social policies" (Barr v. Mateo, 1959, 360 U.S. 564, 576). Further generalities about "legislative activity in the classic and historic sense" do not indicate to us why we are drawing wrong in ~~XXXXXXXX~~ a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified ~~documents~~ documents through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern. In repeating the familiar arguments why he should be absolutely protected with respect to introducing the exhibits before the subcommittee -- a matter no one questions -- and talking broadly about his duty to inform the public, intervenor does not answer our analysis of what should be the subsequent limits of protection.

The petition for reconsideration is denied.

Alternatively, petitioner seeks clarification of our order. We do not, however, understand how he can think the order permits inquiry of third persons directed to his motives. We see no need of clarification here. His further inquiry, whether the questions could be asked of third parties about "preparation for the hearing if that relates to his motives for holding it," (emphasis suppl.) perhaps calls for comment.

During oral argument we posed a hypothetical, not repeated in our opinion, but to which intervenor now returns. Suppose that the President's private diary is stolen, and thereafter a Congressman introduces it into the legislative record. Petitioner's present brief suggests that since this would be an exercise of "the informing function of exposing Executive behavior," the only answer he would have to make would be to the "House and . . . the people," unless he participated in the theft. His point is put best in the form that preparation is part of speech, and that if inquiry may be made even as to third parties

as to the sources, he will be inhibited. Here, it seems to us, some adjustment of competing interests must be made. We believe that if a document shown to be improperly at large is sought to be traced, it may be traced by inquiry of third parties even if the effect may be to lead to a legislator. In United States v. Johnson, 1966, 383 U.S. 169, the prosecution was barred from questioning third parties about their role in preparing a congressional speech only because the questions were directed to proving that the speech itself was part of a criminal conspiracy. This should not mean that all illegal activity is insulated from inquiry, apart from prosecution, simply because it could be characterized as preparation for a speech. The introduction of the document into the subcommittee records, like Thetis' immersion of Achilles, cannot effect universal protection.

Intervenor has a valid point with respect to the portion of the order relating to Rodberg. This is clarified by inserting after the phrase "his

own actions" the words "in the broadest sense,
including observations and communications, oral or
written, by or to him, or coming to this attention."

This brings us to the government's motion
to revoke our stay, which was granted broadly, pending
appeal, to cover all facets of intervenor's contentions.
With a limit of time on the grand jury proceedings,
we amend the stay by substituting the order called for
by our opinion, and contained in the judgment, but as
presently clarified as to Rodberg. This amendment and
substitution is, in turn, stayed until January 26,
1972, to permit intervenor, if he sees fit, to apply
forthwith, prior to Friday of this week, to the Circuit
Justice.